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October 5, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Ex Parte: Submission in CC Docket No. ~~97-121~~ 98-121

Dear Ms. Salas:

On October 5, 1998, MCI WorldCom, Inc. submitted the attached letter addressed to Ms. Kathryn C. Brown, Chief, Common Carrier Bureau.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(2) of the Commission's rules.

Sincerely,

Karen Reidy

Karen T. Reidy

Attachment

cc: Kathryn C. Brown
Christopher Wright
Thomas Power
James Casserly
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List A B C D E

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JONATHAN B. SALLET
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October 5, 1998

Kathryn C. Brown, Esq.
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554

Re: Ex Parte: CC Docket No. 98-121
Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of InterLATA Service in Louisiana

Dear Ms. Brown:

In evaluating section 271 applications, the Commission may be called upon to reconcile the interrelationship of sections 251, 252 and 271 of the Telecommunications Act, as well as the statutory basis for the Commission's jurisdiction over matters involving local competition from a legal and policy perspective. The various proceedings and forums that are invoked in sections 251 and 252 for the resolution of local competition issues will inevitably result in diverse, if not contradictory, outcomes. How, then, should this Commission implement section 271 to achieve a consistent body of precedent defensible in the federal courts? Simply, the Commission has, and must exercise, its independent jurisdiction under section 271 to fulfill its statutory obligation to open local markets to competition prior to opening in-region long distance to the Bell Operating Companies (BOCs).

As explained below, competitive local exchange carriers (CLECs) have a variety of means to attempt to compel BOCs to open local markets to competition, including multiple rounds of negotiation, arbitration, section 252 litigation, separate state commission proceedings including complaint actions, and insistence that BOCs abide by their independent duty to open their markets prior to obtaining section 271 relief. Regardless of which option or options one or more CLECs pursue, it is the sole responsibility of this Commission to make an independent determination whether a BOC has met its burden to comply with section 271. Any other result would undermine the central purpose of section 271 and lead to conflicting Commission decisions on identical factual issues.

The validity of this view is easily illustrated. For example, it cannot seriously be contested that if a state commission were to rule that a BOC need not have any automated OSS interfaces for use by CLECs -- whether or not that decision was appealed or upheld on review --

a BOC that applied for 271 entry without any automated OSS for use by CLECs would not be entitled to entry. As the FCC has consistently recognized, OSS gives meaning to the statutory requirement that incumbent local exchange carriers provide interconnection or network elements. Relying on the state commissions' evaluation of the sufficiency of OSS could lead to the absurd result of a BOC receiving 271 authorization for one state, while being denied authorization for another state in the same region, even though the BOC's OSS is region-wide. This is because one state commission could judge the OSS sufficient, while another state commission could judge the identical OSS inadequate. From these hypotheticals we can conclude that a state commission's application, in any context, of section 251 on non-pricing issues is not dispositive of the question whether a BOC, applying for in-region long-distance authority under section 271, has satisfied the independent requirements of that section. The correctness of this interpretation is of course underscored by the state's statutory role as a party whose views are consulted, but not entitled to any special weight in the Commission's decision-making process.

Moreover, deciding section 271 issues independent of section 252 claims ensures consistent rulings and a uniform set of national rules that BOCs must meet. If the Commission were to decide section 271 applications based on the state-specific status of section 252 claims, the Commission could, similar to the situation discussed above, rule that a BOC's application for 271 authority should be granted in one state but denied for a different state in the same region -- even where the BOC's conduct and checklist compliance were identical in both states. Inconsistent rulings on identical facts would also occur if section 271 rulings were to depend on the varying decisions of federal district courts applying a deferential standard of review to state commission decisions. Congress clearly intended to avoid such absurd results by requiring the FCC to reach an independent decision on section 271 applications.

Finally, the Commission's exercise of its 271 authority prevents holding local competition hostage to the resource constraints faced by new entrants, many of them independent start-up companies. For example, whether to engage in section 252 litigation on a particular issue involves a number of important factors independent of the question whether the underlying ruling was correct. A CLEC must consider whether there are other means to achieve the same or a better result more expeditiously (such as through continued negotiation or separate state dockets and collaborative proceedings); whether the resources needed for litigation are better deployed on market entry; and whether the courts are likely to continue to defer to state commissions on fact-intensive issues regardless of whether the underlying commission decision was correct. Indeed, this Commission has acknowledged in its appellate briefs that district courts are to defer to state commissions on fact-intensive issues. Thus, the Commission's statutory role as the sole, independent decisionmaker in section 271 applications is critical for all new entrants -- particularly for smaller CLECs who lack the resources to engage in widespread arbitration and litigation, and who instead depend on the BOCs to comply with their independent obligations under section 271 -- and for consumers who will be the ultimate victims if section 271 is not thoroughly enforced.

The question of the relationship between sections 251, 252 and 271 can be addressed in the context of any section 271 requirement, but has been raised by BellSouth in the context of performance standards. At the state level, MCI's request for performance standards and remedies in Louisiana could have been resolved through continued negotiations, through state arbitration and section 252 litigation, or through separate state commission proceedings initiated by the Louisiana Public Service Commission (PSC). In the BellSouth region, MCI and BellSouth mutually agreed to attempt to negotiate a common set of performance measurements, standards and remedies after the initial round of interconnection negotiations and arbitrations. In addition, MCI elected to buttress that effort by enlisting the assistance of several states, including the Louisiana PSC in its performance docket. Thus, MCI WorldCom has consistently demanded performance standards and remedies both in negotiations with BellSouth and in separate, ongoing state proceedings initiated by the Louisiana PSC to address performance standards and remedies. See Declaration of Marcel Henry, ¶¶ 44-45 (Ex. A to MCI's Initial Comments); MCI's Initial Comments at 34-38; MCI's Reply Comments at 5-11 & n.6; Reply Ex. C. Indeed, on September 21 the Louisiana PSC established a procedural schedule to take evidence through 1999 to resolve outstanding issues concerning BellSouth's performance reporting and to establish performance benchmarks and remedies.

Regardless of which option MCI WorldCom and other CLECs have pursued based on their judgment of the likelihood of obtaining standards and remedies in the near term -- including if CLECs had decided to rely exclusively on BellSouth's obligations under section 271 -- this Commission is legally required to make an independent finding on the issue of whether BellSouth's performance standards and remedies (or, in this case, the absence of standards and remedies) satisfy section 271.

The Commission has at least two independent legal bases for rejecting a section 271 application based on the absence of performance standards and remedies. First, the checklist requires reasonable and nondiscriminatory access to unbundled elements, interconnection, and resale. See, e.g., 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiv); 251(b)(1), 251(c)(2), 251(c)(3), 251(c)(4). These critical requirements would be rendered meaningless without objective standards and remedies to ensure that the service BOCs provide to their captive CLEC customers is reasonable and at least equal to the quality and timeliness of service the BOCs provide to themselves (including the BOCs' own customers and affiliates). Indeed, the Commission has recognized that the general duty to provide reasonable and nondiscriminatory service should be implemented through "specific rules determining the timing in which incumbent LECs must provision certain elements." Local Competition Order ¶ 310 (emphasis added). Nothing in the Iowa Utilities Board decision undermines the Commission's section 271 or 251 authority on issues of performance standards; to the contrary, the court explicitly affirmed the FCC's authority to issue regulations relating to unbundling of elements including OSS. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998).

Moreover, performance standards and remedies are important to section 271 in order to ensure that local markets remain competitive following section 271 entry. Michigan Order ¶¶ 393-394 (CC Docket No. 97-137). Further, the Department of Justice has consistently found that performance standards and remedies are necessary to prevent backsliding -- including in its evaluation of BellSouth's most recent application. See DOJ Eval. at 38-39. Thus, even leaving aside the importance of performance standards and remedies to the checklist and to section 251, the Commission remains the sole arbiter of whether the public interest test has been satisfied, and specifically whether a BOC is subject to mechanisms that will ensure that local competition continues after section 271 authority is granted.

The need for the Commission's independent assessment of performance requirements is particularly acute in this case because of BellSouth's continuing and successful efforts to delay resolution of performance standards and remedies at the state level. As MCI explained in its comments -- points BellSouth does not rebut -- BellSouth has resisted agreeing to performance standards and remedies in negotiations and has asked the Louisiana PSC to defer consideration of standards and remedies. Indeed, in its reply testimony, BellSouth argues for an additional 6-12 month delay in consideration of performance standards. Stacy Reply Aff. ¶ 12. It is disingenuous for BellSouth to ask this Commission to defer to the absence (to date) of state-imposed standards when BellSouth is solely responsible for delaying imposition of performance standards in negotiations and state proceedings. Acceding to such gaming would not only violate the Commission's duties under section 271, but would encourage the BOCs to further subvert the negotiation and arbitration process.

In sum, it is indisputable that decisionmaking power with respect to applications for long-distance entry under section 271 rests solely with the Commission. Section 271(d)(3) provides that "[t]he Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that" each of the substantive requirements of section 271 has been met. Thus, the Act places an affirmative obligation on the Commission to withhold section 271 authorization unless it has itself found the BOC to be in compliance with all of section 271's requirements. As the D.C. Circuit expressly held in its affirmance of the Commission's Oklahoma decision, "[u]nless the FCC concludes to its own satisfaction that the applying BOC has satisfied either Track A or Track B, as well as the other statutory requirements, it 'shall not approve the authorization.'" SBC Communications, Inc. v. FCC, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added).

The D.C. Circuit further explained that "[a]lthough the Commission must consult with the State commissions, the statute does not require the FCC to give the State commissions' views any particular weight. . . . Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA authority." SBC Communications, 138 F.3d at 416-17. Thus, the Commission is the ultimate decisionmaker with respect to BOCs' compliance with the requirements of section 271, and that determination cannot vary on a state-by-state basis depending on the posture of section 252 litigation, let alone based on varying interpretations of section 251 by state commissions.

Sincerely,

Jonathan B. Sallet
Chief Policy Counsel

cc: Christopher Wright
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